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Chairman: Mr. Gómez Robledo ..... (Mexico)

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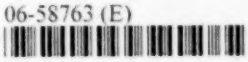

The meeting was called to order at 10.05 a.m.

Agenda item 78: Report of the International Law Commission on the work of its fifty-eighth session (*continued*) (A/61/10)

1. **Ms. Escobar Hernández** (Spain) said that her delegation was pleased overall with the set of draft articles on diplomatic protection. Among the major contributions of the draft articles were the reaffirmation of diplomatic protection as a right of the State, the maintenance of nationality as the basic criterion for the exercise of diplomatic protection, and the definition of continuity of nationality as the period extending from the date of injury to the date of official presentation of the claim. The draft articles in their final form ably addressed diplomatic protection of natural persons, the specific problem of shareholders and the exhaustion of domestic remedies. The explanations in the commentaries on the differences between diplomatic protection and consular assistance and on the concept of "predominant nationality" had answered many questions previously raised by Spain.

2. The draft articles struck a good balance between codification and progressive development of the law. Draft article 8 was an appropriate response to the need to ensure protection of refugees and stateless persons, while draft article 19 laid emphasis on the ultimate beneficiary of diplomatic protection. However, since draft article 19 was cast in the form of recommendations, it appeared to be out of keeping with the overall form of the draft articles and might benefit from redrafting.

3. In the view of her delegation, the work on diplomatic protection had advanced sufficiently for the elaboration of a convention on the topic. It supported the Commission's recommendation in that regard and considered that it would be appropriate for the General Assembly to establish an ad hoc committee to prepare a draft convention on diplomatic protection based on the Commission's text.

4. In adopting a set of draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, the Commission had taken another important step forward in its work on the large complex of questions concerning international responsibility. However, her delegation failed to understand why the Commission had opted to cast its work in the form of non-binding principles and merely to recommend that the General Assembly should endorse the draft principles by a resolution and urge States to take national and international action to implement them. The topic of responsibility, being central to the entire legal system, should be addressed through normative texts properly speaking, not through "soft law" texts. Moreover, there was no reason why different treatment should be given to prevention of transboundary harm from hazardous activities and the allocation of loss arising out of such activities, particularly since the latter concerned real victims. Such differentiation could undermine effectiveness and should be avoided. Her delegation would prefer that all the aspects of international responsibility should be given the same treatment and would like to see the draft principles in the future take the form of a convention; it was therefore premature for the Assembly to adopt a resolution such as the Commission recommended.

5. With regard to its long-term programme of work, the Commission must, of course, continue to respond to new situations and new developments in international law. However, the new items added to its programme of work must accord with the Commission's mandate and allow for the best use of available resources. The topics chosen should be those that were best suited for codification and reflected needs actually felt by States. Among the new topics selected by the Commission, her delegation gave special weight to those relating to the exercise of State jurisdiction with an international dimension, which formed an identifiable group within the topics selected.

6. **Mr. Henczel** (Poland) said that his delegation supported the Commission's recommendation that the draft articles on diplomatic protection serve as the basis for the elaboration of a convention. He noted, however, that they did not address some important issues, in particular the idea that persons had a right to the protection of the State of which they were nationals. The traditional doctrine of the State's absolute right to decide whether or not to exercise diplomatic protection on behalf of its nationals needed to be adapted to contemporary practice, particularly since the constitutions of many States guaranteed the individual's right to diplomatic protection and thereby offered substantial evidence of *opinio iuris*. That right was not only intended to ensure that a national injured abroad had access to the State's consular officials but was also enforceable under the municipal law of the

States concerned. Poland held that the State of nationality had a legal duty to exercise diplomatic protection on behalf of an injured person, upon request, and that without such a request, the State had the legal duty to do so if the injury resulted from a grave breach of *jus cogens* norms of international law attributable to another State.

7. His delegation also supported the Commission's recommendation that the General Assembly should endorse by a resolution the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities and urge States to take national and international action to implement them. His delegation shared the view that the final form of the second and concluding part of the work on international liability should not be different from that of the first part, on the preventive aspects. In that connection he recalled that in 2001, the Commission had recommended to the General Assembly that the draft articles on prevention of transboundary harm from hazardous activities should form the basis for the elaboration of a convention. The current draft principles on allocation of loss were well balanced, firmly based on existing practice and numerous international instruments and constituted an important step in the implementation of international law in that field. However, the relationship of the draft principles to the articles on State responsibility and to article 60 of the Vienna Convention on the Law of Treaties required further study. His delegation agreed that the main basis of the draft principles should be "polluter pays" and "all damage should be covered" and that the financial burden should fall on the operator of the activity causing the damage. He therefore welcomed the stipulation in draft principles 6 and 8 that remedies should be available to enable the victims of damage to obtain reparation. With regard to the definition of damage contained in draft principle 2 (a), he suggested that the words "in particular" should be inserted so as to leave the way open for future developments, and that the reference to cultural heritage should be omitted, unless special rules were proposed on liability for damage in that area. Compensation for damage caused by hazardous activities should be not only prompt and adequate, as specified in draft principle 3, but also effective and proportional; the conduct of the operator should also be taken into account. That triple requirement was in line with the principles governing State responsibility and highlighted the mutual connections between the two systems.

8. While the Commission had made only limited progress on the topics it had taken up the previous year (expulsion of aliens and the effects of armed conflicts on treaties), it had finalized its work on four important topics. It had thus, at the end of its five-year term, left a rich heritage for further work in the following years in the form of two categories of topics, those started in the past two years and those already well advanced, which were expected to be finalized in the near future. Poland appreciated the Commission's constant efforts to maintain its substantial engagement with major issues in contemporary international law and fully supported the inclusion in its long-term programme of work of the five topics on which syllabuses had been usefully provided in annexes to the report. However, his delegation had doubts about reopening the topic on the most-favoured-nation clause since the basic policy differences that had prevented the General Assembly from taking action on the Commission's earlier draft articles on the topic had not yet been resolved. In conclusion, he commended the Commission for its work during its fifty-eighth session and for its achievements over the quinquennium. The significance of the topics addressed and their codification for both the theory and the practice of contemporary international law could not be overestimated.

9. **Mr. Horváth** (Hungary) drew attention to the Commission's significant achievement in completing the second reading of the draft articles on diplomatic protection and on international liability in case of loss from transboundary harm arising out of hazardous activities. However, some of the topics on its agenda, such as reservations to treaties, were still awaiting completion after a number of years. With regard to its decision to include five new topics in its long-term programme of work, his delegation attached most importance to the issue of the immunity of State officials from foreign criminal jurisdiction and the question of the jurisdictional immunity of international organizations. Owing to the heavy workload of the Commission, he was more hesitant about the inclusion of other topics.

10. Concerning diplomatic protection, his delegation's view was that State practice and case law had already established a regime of clearly defined principles and specific rules which were now largely part of customary law and indeed of treaties, such as the articles on State responsibility. The adoption of the draft articles on diplomatic protection codified a

chapter of customary law complementary to the topic of State responsibility. He supported the adoption of the draft articles.

11. Turning to the draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, he explained that because of its vulnerable position in the Danube water basin Hungary had consistently advocated a proper legal regime to govern such losses. In the past few years, however, it had been able to conclude bilateral agreements on the matter with its neighbours. His delegation would therefore have preferred a set of draft articles to a set of draft principles. He did, however, agree with the Commission's remark in its report that draft principles would have the advantage of not requiring a harmonization of national laws and legal systems, and that the goal of widespread acceptance of the substantive provisions was more likely to be met if the outcome was cast as principles (para. 12 of the general commentary). His delegation could accept the draft principles provided all interested countries contributed to fulfilling the goal stated in their preamble of putting in place appropriate and effective measures to ensure that those natural and legal persons, including States, that incurred harm and loss as a result of such incidents were able to obtain prompt and adequate compensation.

12. **Mr. Panahiazar** (Islamic Republic of Iran) noted that the draft articles on diplomatic protection were rightly concerned only with the rules governing the circumstances in which diplomatic protection might be exercised and the conditions that must be met before it could be exercised; they did not seek to determine the ways in which a person might acquire the nationality of a State, a topic which was not within the Commission's mandate. In draft article 4, the Commission eloquently stated the right of States to determine who their nationals were. His delegation believed that States, in exercising that right, should avoid adopting laws that increased the risk of dual or multiple nationality or statelessness.

13. The "predominant nationality" test contained in draft article 7 remained a subjective criterion, since there were no objective criteria or decisive factors to be taken into account in determining which nationality was predominant. The draft article was not based on customary international law, which recognized the rule of the non-opposability of diplomatic protection against a State in respect of its own nationals, and it was premature for such a step to be taken in the context of the progressive development of international law. In the commentary to draft article 7, the Commission had cited awards of the Iran-United States Claims Tribunal as recent sources for the evolution of the rules of international law in the field of diplomatic protection. His delegation disagreed. Most of the awards of that Tribunal in cases of dual nationality concerned the law of treaties and the interpretation of the Algerian Declaration signed by those two Governments in 1981 rather than diplomatic protection. Moreover, most of the disputes brought by claimants with dual nationality involved a private party on one side and a Government or government-controlled entity on the other, and many primarily revolved around issues of municipal law and general principles of law. The inclusion of such a controversial article made it impossible for otherwise interested States to approve the final text.

14. Extending diplomatic protection to corporations, covered in chapter III of the draft articles, was in most cases unnecessary, as the circumstances in which corporations performed their activities and the procedures for settlement of disputes were largely regulated by bilateral and multilateral treaties. With regard to the exception of undue delay set out in draft article 15, subparagraph (b), slow proceedings should not be considered ipso facto a reason for allowing an exception to the local remedies rule. For unavoidable reasons, judicial proceedings were more time-consuming in some countries than in others. Judicial authorities should not accord different treatment in the administration of justice to their own citizens and foreign nationals, since equality before the law and non-discrimination were generally accepted principles.

15. **Mr. Dufek** (Czech Republic) said that the draft articles on diplomatic protection adopted by the Commission at its fifty-eighth session were one of the major achievements of the quinquennium and a substantial contribution to the codification and progressive development of international law. They duly reflected the recognized rules of customary international law in that area or, when those rules were not clear, were weighted in favour of the broader protection of the rights of injured persons. His delegation supported that approach, as reflected for instance in the decision, in draft article 5, paragraph 1, to consider the *dies ad quem* for the exercise of diplomatic protection to be the date of official presentation of the claim rather than the date of its

resolution and in the exemption from the continuous nationality rule, in draft article 5, paragraph 2. Some of the draft principles marked a step forward in the progressive development of the international law rules of diplomatic protection, in particular draft articles 8 and 19. Draft article 8 closed a gap in the international protection of stateless persons and refugees, while the importance of draft article 19 lay in the fact that diplomatic protection was often the only effective remedy to secure the protection of persons injured through an internationally wrongful act of another State. His delegation would, however, welcome a more detailed commentary, over and above the commentary to draft article 5, on situations involving the death of the injured individual, especially as a consequence of a significant injury caused by a foreign State, before the official presentation by that individual's State of nationality of a claim in respect of the injury.

16. With regard to the future form of the draft articles, he said that they should, for the time being at least, remain non-binding. The General Assembly should adopt a resolution taking note of the draft articles, with an annex reproducing them in full, as it had done in 2001 in the case of the articles on the responsibility of States for internationally wrongful acts. There was a connection and a similarity, in both substance and nature, between the two sets of draft articles. Even in non-binding form the draft articles on diplomatic protection could serve all practical purposes and would provide, in practice as well as in theory, a complex and highly authoritative set of guidelines in that field.

17. On the issue of the Commission's future agenda, the Czech Republic believed that the focus should be on topics for which there was abundant case law and established State practice, or on topics that reflected the consistency and continuity of the Commission's work, rather than on passing concerns. "Immunity of State officials from foreign criminal jurisdiction" and "Jurisdictional immunity of international organizations" were excellent examples of such topics.

18. **Mr. Troncoso** (Chile) said that the ninth report of the Special Rapporteur on unilateral acts of States (A/CN.4/569 and Add.1), which the Commission had taken into consideration in adopting its Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, constituted a valuable contribution to the legal doctrine on the topic through its systematic treatment of the scarce State practice that could be compiled and the international case law and writings of jurists on the subject. In so doing, the Special Rapporteur had strictly complied with the Commission's mandate and the requests of delegations in the Sixth Committee.

19. On the matter of the invalidity of unilateral acts, as in other matters touched upon, the Special Rapporteur's ninth report adhered closely to the provisions of the 1969 Vienna Convention on the Law of Treaties. Chile had always supported that approach as a starting point for analysis. In general, his delegation agreed with the inclusion of the categories of grounds for invalidity of unilateral acts proposed by the Special Rapporteur, namely, invalidity on the grounds that the representative lacked competence, invalidity related to the expression of consent and invalidity of a unilateral act contrary to a norm of *jus cogens*. However, with respect to the coercion of a representative of a State (draft principle 7, para. 4), it would be more appropriate to word the guiding principle in an imperative and not merely a facultative manner ("coercion ... may be invoked"), since the resulting invalidity was absolute and could not be remedied by subsequent confirmation. The wording should be in line with that of the other two grounds of absolute invalidity. The provision concerning corruption of a representative of a State (draft principle 7, para. 3) would be more strictly correct if reworded as follows: "Corruption of the representative of the State may be invoked as grounds for declaring a unilateral act invalid if the expression of consent to be bound by that act was formulated owing to the corruption of the person formulating it". The issue was not the formulation of the act but the expression of consent to be bound "owing to corruption". Once again using the 1969 Vienna Convention on the Law of Treaties as a guide, the Special Rapporteur had correctly identified the grounds that could result in the termination, modification, suspension and revocation of a unilateral act (principles 8 and 9).

20. With respect to matters considered on earlier occasions and revisited in the ninth report, Chile fully concurred with the definition of a unilateral act proposed by the Special Rapporteur (principle 1), which focused on unilateral acts *stricto sensu* and excluded consideration of conduct that might produce similar effects. In identifying the persons having competence to formulate unilateral acts on behalf of a State (principle 3), Chile favoured a restrictive

approach; any extension of competence to persons other than heads of State, heads of Government and ministers for foreign affairs should be considered an exceptional situation requiring irrefutable evidence that the State was willing to be bound by such persons. With respect to the basis for the binding nature of unilateral acts (principle 10), his delegation considered it unnecessary to have a principle specifying that the basis was good faith and intent to be bound, since good faith was a basic principle of all legal systems, especially in the sphere of obligations, while intent to be bound was an inherent subjective element of all acts intended to produce legal effects. Concerning the interpretation of unilateral acts, Chile fully concurred with the Special Rapporteur that restrictive criteria were called for, since it was uncommon for States to assume obligations, in other words, to limit the exercise of their powers in the international sphere, on their own initiative. Hence, in the case of reasonable doubt as to whether an obligation had been assumed through a unilateral act, the presumption should be negative.

21. The text of the Guiding Principles and commentaries thereto adopted by the Commission at its fifty-eighth session constituted an adequate summary of the principles formulated by the Special Rapporteur and clarified several doubtful issues in the latter's report. His delegation believed that, although the elaboration of a regime applicable to all unilateral acts and conduct might be a lengthy task, the work already done should be continued until, at the least, a set of guidelines was elaborated to guide States in their practice, and the Guiding Principles adopted by the Commission could be considered a step in that direction.

22. **Ms. Zabolotskaya** (Russian Federation) said her delegation would prefer the Commission to give priority, in its long-term programme of work, to the protection of persons in the event of disasters and jurisdictional immunity of international organizations. A third topic favoured by her delegation was extraterritorial jurisdiction.

23. The draft articles on diplomatic protection adopted by the Commission appeared to be a happy blend of codification and progressive development of the international law on the subject. Draft article 1 offered a good definition of diplomatic protection. She supported the Commission's decision to confine to its commentary the nature of the distinction between diplomatic protection and consular assistance, although the latter should have been termed "consular protection", in order to reflect the language used in treaty practice. The Commission had managed to avoid the issue of whether the right to protection derived only from the State or also from the injured national. She agreed, however, with its assumption that diplomatic protection was essentially an act of invocation by a State of the responsibility of another State. It was on that assumption that the Commission had based its provisions on the nationality of claims and the exhaustion of internal remedies. She also agreed with its premises, in draft articles 5 and 10, concerning the continuous nationality of natural persons and corporations. The requirement of continuous nationality was framed clearly and the temporal boundaries within which continuity could be presumed were reasonable. Those temporal boundaries were important for determining the admissibility of claims. It would have been somewhat illogical to posit a link between admissibility and a loss of nationality occurring after the presentation of a claim. In any event, draft article 5, paragraph 4 and draft article 10, paragraph 2, provided a safeguard for cases where a person or corporation acquired the nationality of the State against which the claim was brought after the date of the official presentation of the claim.

24. The Commission had rightly included in the draft articles provisions to cover cases of multiple nationality. As the commentary to draft article 6 observed, dual or multiple nationality was a fact of international life. Situations where claims were made on behalf of persons holding multiple nationality should be dealt with in accordance with the general principles of law governing the satisfaction of joint claims.

25. She welcomed the solution of the "cumulative criterion" adopted in draft article 9 for a State to qualify as the State of nationality of a corporation. She was doubtful about the decision, in draft article 15 (a), to lower the threshold for the exhaustion of local remedies. However, the wording of that provision represented a considerable improvement over the earlier version. The provision in paragraph (a) of draft article 11, on the protection of shareholders, was controversial and could be abused. Draft article 13, on the protection of legal persons other than corporations, could have been omitted. It seemed to be premature, because there were no customary rules as yet to cover

the subject. However, as a whole the draft articles were well-balanced and deserved adoption in the form of a convention. A special working group or committee could be established to formulate the introductory and concluding provisions of the draft. Another option would be to postpone discussion of the draft until the fifty-ninth session of the Commission, when it would be discussing the appropriate action to be taken with regard to the articles on State responsibility for internationally wrongful acts. However, her delegation took the view that the present draft articles could stand alone and should not be tied to those on State responsibility.

26. Turning to the general topic of international liability for injurious consequences arising out of acts not prohibited by international law, she said that in view of the paucity of treaty rules in that area the Commission had taken the best possible approach by deciding to prepare guiding principles to govern liability in case of loss from transboundary harm arising out of hazardous activities. Her delegation endorsed the chosen scope of application of the draft principles, from which the Commission had rightly decided to exclude damage to the environment occurring beyond the boundaries of national jurisdiction. She endorsed the inclusion of the qualifier "significant" for the types of damage in question. She also agreed with the Commission that it would not be fruitful to attempt to draw up an exhaustive list of the activities to which the draft principles should apply. She endorsed its decision to exclude from the scope of draft principle 4 an obligation for States to compensate victims of transboundary damage, stipulating merely that each State "should take all necessary measures" to ensure the payment of compensation. That wording reflected the fact that the draft principles dealt only with activities not prohibited by international law. She supported the Commission's endeavour to establish strict liability for the operator in the case of transboundary harm, but it should be noted that international legal instruments governing particular aspects of substantive liability made provision for circumstances in which no liability arose for the operator, for instance when the harm occurred as the result of natural disasters or armed conflict, or where the State of the operator had not taken all the steps required by international law vis-à-vis the operator. Those exceptions ought to be included in the commentary, although it would be desirable to include them in the text of the draft principles.

27. In draft principle 2 the Commission had opted for an all-inclusive definition of "damage", which included damage to the environment. The definition was an acceptable one at the current juncture, although it prompted some doubts on the part of her delegation. Generally speaking, her delegation was in favour of the draft principles, which could be adopted by the General Assembly in the form of a declaration. However, in view of the shortage of time for delegations to study them, her own delegation would not object to postponing consideration of the draft principles to the fifty-ninth session of the Commission. Lastly, it would also be logical for the Commission to revert to the question of adopting draft articles on the prevention of transboundary harm, which would complement the present draft, although the two drafts should not be treated as interdependent.

The meeting rose at 11.25 a.m.